IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND MS SUCHITRA KAMBLE, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA Nos.6500 & 6501/Del/2017
Assessment Years : 2008-09 & 2012-13

Nokia India Pvt. Ltd., TEC, Level-18, DLF Cyber City, Phase-III, Building No.5, Haryana – 122 002 PAN No. AAACN 2170 R	Vs.	ACIT, Special Range – 6, New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Ankul Goyal, Adv. Ms. Sehr Chopra, Adv.
Respondent by	Shri Anupam Kant Garg, CIT-D.R.

Date of hearing:	12/10/2020
Date of Pronouncement:	15/10/2020

ORDER

PER ANIL CHATURVEDI, AM:

These two appeals filed by the assessee are directed against the order of Additional Commissioner of Income tax Special Range-6, New Delhi dated 30.08.2017 (pursuant to the directions of DRP) for Assessment Year 2008-09 & 2012-13.

ITA No.6500/Del/2017 for A.Y. 2008-09 :-

2. The relevant facts as culled from the material on records are as under:

3. Assessee is a company stated to be wholly owned subsidiary of Nokia Corporation, Finland and is stated to be primarily engaged in the business of trading and manufacturing of mobile handsets, spare parts and accessories. Assessee filed its return of income for A.Y. 2008-09 on 30.09.2008 declaring total income of Rs.909,98,53,004/-. The case was selected for scrutiny and thereafter, assessment was framed u/s 143(3) vide order dated 30.11.2012 determining the total income at Rs.1520,44,16,770/-. Subsequently, notice u/s 148 dated 06.08.2014 was issued and served on the assessee. Thereafter, the case was referred to TPO to determine the "Arm's Length Price" u/s 93CA(3) of the Act in respect of "international transactions" entered into by the assessee with its Associated Enterprises (AE). The TPO after examining the assessee's transfer pricing documentation and other details passed an order dated 28.10.2016 u/s 92CA(3) of the Act and recommended adjustment amounting to Rs.5500,366,412/-. Thereafter, AO passed draft assessment order u/s 147/143(3) r.w.s 144C of the Act vide order dated 27.12.2016 proposing to assess the total income of the assessee at Rs.8052,48,62,672/-. Against the draft assessment order, assessee carried the matter before the DRP who vide order dated 20.06.2017 passed u/s 144C(5) directed the AO to complete the assessment as per the directions given therein. Pursuant to the directions of DRP, AO passed order u/s 143(3) r.w.s 144C(13)/ 147 vide order dated 30.08.2017 determining the total income of Rs.7875,30,97,404/-. Aggrieved by the aforesaid order of AO, assessee is now before us.

4. Before us, assessee vide letter dated 12.07.2019 has *inter alia* submitted that in addition to filing the appeal before the Hon'ble Tribunal, assessee had also filed an application under Article-24 of the India - Finland Double Taxation Avoidance Agreement ('DTAA') for initiation of Mutual Agreement Procedure ('MAP') before the Indian and the Finnish Competent Authorities ('CA') on the issues relating to disallowance u/s 40(a)(ia) of the Act due to alleged failure to withhold tax on payments made to Nokia Corporation towards purchase of end user operating software, purchase of hardware and finished goods and purchase of software embedded in finished goods. It is further stated that resolution has been arrived between the Indian and Finnish Competent Authorities on the aforesaid issues raised before the Tribunal in the present appeal and the said resolution has been accepted by assessee vide letter dated 08.07.2019. The assessee therefore, submitted that in line with the condition precedent, as prescribed under Rule 44H of the Income Tax Rules, the assessee withdraws Ground No.3 to 5 and the residual ground of appeal that survives is as under:

> *"The Learned AO and Hon'ble DRP have erred in disallowing the expenses amounting to INR 191,75,43,450 incurred by the appellant on trade offers provided by it to its distributors (HCL Infosystems Ltd as well as other distributors) under section 40(a)(ia) of the Act."*

5. It was noted by the AO that assessee had offered trade incentives to the distributors amounting to Rs.191,75,43,450/- which included Rs.130,38,78,222/- offered to HCL Infosystems Ltd. The assessee was asked to show-cause as to why the amounts not be disallowed u/s 40(a)(ia) on account of non-deduction tax at source. Assessee made the detailed submissions *inter alia* contending that the provision of section 194H, 194C, 194J were not applicable to the case because the payment was not for any contractor of services or work, there was no relationship of agency. The submissions of the assessee were not found acceptable to AO. AO thereafter, for the reasons stated in the order held that the expenditure of Rs.130,38,78,222/- was liable to tax and the provision of section 40(a)(ia) got attracted. Since assessee had failed to TDS on the expenditure, the amount was liable for disallowance u/s 40(a)(ia). He accordingly disallowed Rs.130,37,78,222/-. As far as the payment to HCL Infosystems Ltd. is concerned, AO held that the amounts paid were in the nature of commission and therefore the assessee was liable to deduct tax u/s 194H of the Act. Since assessee had not deducted TDS on the payment made to HCL Infosystem Ltd., provision of section 40(a)(ia) were attracted and he accordingly, disallowed the amount of Rs.61,36,65,228/-.

6. Aggrieved by the order of AO, assessee carried the matter before the DRP. DRP, following the directions passed in assessee's

own case in A.Y. 2011-12, upheld the order of AO. Aggrieved by the order of DRP, assessee is now before us.

7. Before us, Learned AR submitted that identical issue arose in assessee's own case in A.Y. 2010-11 and 2011-12. For A.Y. 2010-11, Hon'ble Tribunal in ITA No. 5791/Del/2015 order dated 20.02.2020 adjudicated the issue in favour of the assessee. He pointed to the relevant findings of the Tribunal in the summary of the arguments placed before the Tribunal. He further submitted that the order passed by the Hon'ble Tribunal was followed by the tribunal in AY 2011-12. He further submitted that since the facts in the case in the year under consideration are identical to that of the A.Y. 2010-11 and 2011-12 therefore following the order of the Tribunal in assessee's own case for earlier years, the issue be decided in similar manner. The DR did not controvert the submissions made by Learned AR but however supported the orders of lower authorities.

8. We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present ground is with respect to disallowance u/s 40(a)(ia) of the Act on account of non-deduction of TDS. We find identical issue arose before the Co-ordinate Bench of Tribunal in assessee's own case in A.Y. 2010-11 and the same was decided by the co-ordinate Bench of tribunal by observing as under:

"We have heard both the parties and perused all the relevant material available on record. It can be seen from Clause 2, 7, 8, 9, 14 and 19 of the "Agreement for the Supply of Cellular Mobile Phones" between HCL and the assessee that relationship between the assessee and HCL is that of principal to principal and not that of principal to agent. The discount which was offered to distributors is given for promotion of sales. This element cannot be treated as commission. There is absence of a principal-agent relationship and benefit extended to distributors cannot be treated as commission under Section 194H of the Act. As regards to applicability of Section 194J of the Act, the Assessing Officer has not given any reasoning or finding to the extent that there is payment for technical service liable for withholding under Section 194J. Marketing activities have been undertaken by HCL on its own. Merely making an addition under Section 194J without the actual basis for the same on part of the Assessing Officer is not just and proper. The Ld. DR's contention that discounts were given by way of debit notes and the same were not adjusted or mentioned in the invoice generated upon original sales made by the assessee, does not seem tenable after going through the invoice and the debit notes. In fact, there is clear mentioned about the discount for sales promotion. Thus, on both the account the addition made by the Assessing Officer does not sustain. Ground No. 2 is allowed."

9. We further find that the tribunal order for A.Y. 2010-11 was followed by the Co-ordinate Bench while deciding the appeal of Assessee in A.Y. 2011-12 (ITA No. 1883/Del/2017 order dated 17.08.2020). Before us, Revenue has not placed any material on record to demonstrate the order in assessee's own case for A.Y. 2010-11 has been set-aside/stayed or overruled by higher judicial forum nor has pointed to any distinguishing feature in the facts of the case in the year under consideration and that of AY 2010-11 and 2011-12. We therefore, following the order of the Co-ordinate Bench for A.Y. 2010-11 and for similar reasons hold that the

disallowance u/s 40(a)(ia) of the Act was not warranted in the present case. We therefore, set aside the action of AO. **Thus ground of appeal of the assessee is allowed.**

10. In the result the appeal of the Assessee is allowed.

ITA No. 6501/Del/2017 for A.Y. 2012-13

11. As far as ITA No. 6501/Del/2017 for A.Y. 2012-13 is concerned, the revised ground raised by the assessee reads as under:

> *"1. The order dated August 30th 2017 passed by the Learned under section 143 (3) read with section 144C of the Act pursuant to the directions of the Honorable DRP dated July 03, 2017 is bad in law and on the facts and circumstances of the case and the same is liable to be set aside.*
>
> *2. The Learned AO and honorable DRP have erred in disallowing expenses amounting to INR 987,59,99,645 incurred by the appellant on trade offers provided by it to its distributors (HCL Infosystems Limited as well as other distributors) under section 40(a)(ia) of the Act.*
>
> *3. The Learned AO and Hon'ble DRP have erred in disallowing an amount of INR 40,87,83,096 incurred by the appellant on trade price protection paid to distributors (other than HCL Infosystems Limited) as compensation for reduction in prices of the handsets, and in ignoring all the evidences (including confirmation from dealers) submitted by the appellant in this regard and further in ignoring the fact that on the basis of similar conformations trade price protection provided to HCL Infosystems limited has been allowed.*
>
> *4. The Ld AO and honorable DRP have erred in disallowing marketing expenditure incurred by the appellant amounting to INR 22,15,43,032 by way of issuance of handsets on a free of cost basis to employees dealers and After Marketing Servicing Centres ('AMSCs') on the ground that the same*

would given in enduring benefit and cannot be claimed as revenue expenditure.

5. *The Ld AO and Hon'ble DRP have erred in not allowing current year depreciation in respect of the phones given to 'AMSC's' for warranty purposes and to Dealers for promotional proposes even though these expenses were treated as capital expenses that it has also added in not allowing earlier year depreciation in respect of the FOC phones.*
6. *The above Grounds of appeals are independent and without prejudice to one another.*
7. *The appellant craves leave to add/ withdraw or amend any ground of appeal at the time of hearing."*

12. Before us, at the outset, Learned AR submitted that Ground No 1, 6 and 7 are general in nature and therefore requires no adjudication. He further submitted that ground No.2 raised in the present appeal is identical to the ground raised by the assessee in A.Y. 2008-09. He therefore, submitted that the submissions made by him for A.Y. 2008-09 would also be applicable to the present ground. Learned DR did not controvert the aforesaid submissions made by the learned AR.

13. We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present Ground No.2 is with respect to disallowance u/s 40(a)(ia) of the Act. Before as both the parties have submitted that the issue raised in the present ground is identical to the ground raised in A.Y. 2008-09. We have hereinabove while deciding the appeal for A.Y. 2008-09 have held that the disallowance u/s 40(a)(ia) is not

justified and have set aside the addition. We for the reasons stated hereinabove while deciding the issue in A.Y. 2008-09 and for similar reasons hold that the disallowance u/s 40(a)(ia) is not called for in the present case and thus **the ground of the assessee is allowed.**

14. Ground No.3 is with respect to disallowance of Rs.40,87,83,096/- on account of trade price protection paid by the assessee.

15. It was noted by the AO that assessee had incurred expenditure of Rs.1,01,45,00,889/- termed as trade price protection discount. The assessee was asked to furnish the details for trade discount including the policy, its nature and the accounting treatment. Assessee made the submissions and *inter alia* submitted that as a part of its sales strategy, the assessee was providing the protection to its distributors against the probable loss which they may suffer due to fall in the prices of handsets in the form of "Trade Price Protection". It was further submitted that it was a standard industry practice and further the expenses incurred were in furtherance of its business. The submission of the assessee was not found acceptable to AO. AO noted that assessee had not explained the procedure followed by it for determining the amount of price protection provided to the distributors and its basis of calculation. He also noted that no

details were provided about the type of handsets lying with the distributors on which price protection was claimed. AO also noted that the trade price protection was not debited as an expenditure in the Profit and Loss account but was directly adjusted from the total sales affected. Thus, according to AO, in the absence of full details, it was not possible to verify the quantum of price protection allowed. AO therefore, concluded that assessee had failed to demonstrate that the price protection offered by the assessee to its distributor actual related to the business needs of the assessee company. He accordingly proposed the disallowance of Rs.101,45,00,889/-. When the matter was carried before the DRP, DRP following the order of DRP for A.Y. 2007-08 directed the deletion of Rs.605,717,793/- pertaining to payment makes to HCL Infosystems Limited and upheld the disallowance to be extent of Rs. 40,87,83,096/-. The AO accordingly in the final order upheld the disallowance to the extent directed by DRP. Aggrieved by the order of DRP, assessee is now before us.

16. Before us, Learned AR submitted that the issue is covered in assessee's favour by the decision of Tribunal in its own case for A.Y. 2010-11 & 2011-12. He submitted that identical issue arose in AY 2010-11 wherein the Co-ordinate Bench of Tribunal vide order dated 20.02.2020 has decided the issue in favour of the assessee and the order for AY 2010-11 was followed by the co-ordinate Bench of Tribunal while deciding the issue in A.Y. 2011-12 (ITA No. 1883/Del/2017 order dated 17.08.2020). He pointed

to the relevant findings of the tribunal. He thus submitted that since there are no changes in the facts under consideration in that of earlier years therefore, the issue be decided similarly. The Learned DR on the other hand did not controvert the submissions made by the learned AR but however, supported the order of lower authorities.

17. We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present ground is with respect to disallowance of expenditure termed as trade price protection. We find that identical issue arose in assessee's own case in A.Y. 2010-11 wherein the Co-ordinate Bench of Tribunal held as under:

> *"11. We have heard both the parties and perused all the relevant material available on record. It is market practice that if there is any change in prices of handsets by competitors, change in life of mobile model, change in market demand of particular model which affects the sales, the distributor is protected by the Trade Price Protection. This is actually a commercial expediency in modern day technological changes which are very fast and vast. Besides, Trade Price Protection is offered to distributors on handsets which have not been subject to trade offers/discounts. This is evidenced by specific clause in the Trade Schemes filed before the Assessing Officer vide submission dated 10.03.2014 trade scheme. In-fact, it was pointed out during the course of hearing that in Assessment Year 2008-09, even the Assessing Officer has allowed the deduction for the instant like expenditure. In Assessment Year 2008-09, the matter was remanded back to the file of the Assessing Officer, who has allowed the deduction with respect to the expenditure, where confirmations have been obtained from the recipients. In any case, so far as the instant year is concerned, we have already noted in the earlier paragraph that the requisite*

confirmations were filed before the Assessing Officer. Thus, this expenditure is allowable as revenue expenditure under Section 37(1) of the Act since it has been incurred wholly and exclusively for business and same cannot be questioned by the Assessing Officer. Ground No. 3 is allowed."

18. We further find that the order of 2010-11 was followed while deciding the issue in assessee's case in A.Y. 2011-12. Before us, the learned AR has submitted that the facts of the case in the year under consideration are identical to that of the A.Y. 2010-11 and 2011-12 and the aforesaid submission of Ld AR has not been controverted by the Revenue. Before us, Revenue has not placed any material on record to demonstrate the order in assessee's own case for A.Y. 2010-11 has been set-aside/stayed or over ruled by higher judicial forum. We therefore, following the order of the Co-ordinate Bench for A.Y. 2010-11 in assessee's own case and for similar reasons hold that the disallowance on account of trade price protection was not warranted in the present case. We therefore, set aside the action of AO. **Thus ground of appeal of the assessee is allowed.**

19. Ground No. 4 & 5 are connected and are with respect to disallowance of Rs.22,15,43,032/-.

20. On pursuing the details of marketing expenses incurred by the assessee, AO noticed that the expenses under that head

included cost of mobile handsets issued Free of Cost to After Marketing Services Centers, AMSC's, dealers and employees. The assessee was asked to show-cause as to why the expenses not be considered to be of capital in nature and disallowed. The assessee made submissions which were not found acceptable to AO. AO was of the view that handsets which were given free of cost to the assessee's employees were to be treated as capital assets as the assessee was receiving the business benefits over a period of time equivalent to the life of the handsets. With respect to the handsets given to the AMSC's, according to him, the same appeared to be similar to warranty expenses and warranty expenses can be claimed as revenue expenditure only if there was reconciliation available between the expenditure incurred and the provision made. He further noted that similar disallowance was made in A.Y. 2010-11 and following the order for A.Y. 2010-11 he proposed the disallowance of Rs.22,15,43,032/- in the Draft Assessment Order. When the matter was carried before the DRP, DRP *inter alia* directed the AO to verify the factual position as per the direction given in the order and thereafter, decided the issue. AO in the final assessment order made the disallowance of Rs.22,15,43,032/-.Aggrieved by the order of AO, assessee is now before us.

21. Before us, Learned AR submitted that the issue is covered in assessee's favour by the decision of Tribunal in assessee's own case for A.Y. 2010-11 & 2011-12. He submitted that order for

A.Y. 2010-11 of the tribunal has followed by the co-ordinate bench in A.Y. 2011-12. He pointed to the relevant findings of the Tribunal and submitted that facts of the case in the year under consideration are identical to that of the earlier years. Learned DR on the other hand did not controvert the submission made by the Learned AR but however supported the order of lower authorities.

22. We have heard the rival submissions and perused all the relevant materials available on record. The issue in the present ground is with respect to disallowance of hand sets given free of cost and included in the marketing expenditure. We find that identical issue arose in assessee's own case in A.Y. 2010-11 and 2011-12 in ITA No. 5791/Del/2020 dated 20.02.2020 wherein the Co-ordinate Bench observed as under:

> *"17. We have heard both the parties and perused all the relevant material available on record. In the present assessment year, the assessee is engaged in manufacture, import and sale of mobile handsets. The assessee has given mobile handsets to its employees, dealers, sale personnel etc. for free of cost and thus no longer owned the said handsets. Thus, the said cost was rightly taken as business expenditure by the assessee and was rightly reduced from the inventory. This issue is decided in favour of the assessee for A.Ys. 2003-04 by the Tribunal in ITA No. 2445/Del/2010 order dated 30.01.2018 which was also affirmed by the Hon'ble High Court in ITA No. 955/2018 order dated 31.08.2018. Thus, Ground No. 5 is allowed."*

23. We further find that the order of 2010-11 was followed while deciding the issue by the co-ordinate Bench of Tribunal in A.Y.

2011-12. Before us, the learned AR has submitted that the facts of the case in the year under consideration are identical to that of the A.Y. 2010-11 and 2011-12 and the aforesaid contentions of the Ld AR has not been controverted by the Revenue. Before us, Revenue has not placed any material on record to demonstrate the order in assessee's own case for A.Y. 2010-11 has been set-aside/stayed or over ruled by higher judicial forum. We therefore, following the order of the Co-ordinate Bench for A.Y. 2010-11 and for similar reasons hold that the disallowance was not warranted in the present case. We therefore, set aside the addition made by AO. **Thus ground of appeal of the assessee is allowed.**

24. **Thus the appeal of the Assessee is allowed.**

25. **In the combined result, both the appeals filed by the assessee are allowed.**

Order pronounced in the open court on 15.10.2020

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Priti Yadav, Sr.PS

Date:- 15 .10.2020

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI